BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Notice of Inquiry,	)	WT Docket No. 99-217
Promotion of Competitive Networks in Local	)	
Telecommunications Markets	)	
	)	
To: The Commission	)	

REPLY COMMENTS OF THE NATIONAL LEAGUE OF CITIES, ALABAMA LEAGUE OF MUNICIPALITIES, ALASKA MUNICIPAL LEAGUE, LEAGUE OF ARIZONA CITIES AND TOWNS, ARKANSAS MUNICIPAL LEAGUE, LEAGUE OF CALIFORNIA CITIES, COLORADO MUNICIPAL LEAGUE, CONNECTICUT CONFERENCE OF MUNICIPALITIES, DELAWARE LEAGUE OF LOCAL GOVERNMENTS, FLORIDA LEAGUE OF CITIES, GEORGIA MUNICIPAL ASSOCIATION, ASSOCIATION OF IDAHO CITIES, ILLINOIS MUNICIPAL LEAGUE, INDIANA ASSOCIATION OF CITIES AND TOWNS, IOWA LEAGUE OF CITIES, LEAGUE OF KANSAS MUNICIPALITIES, KENTUCKY LEAGUE OF CITIES, INC., LOUISIANA MUNICIPAL ASSOCIATION, MAINE MUNICIPAL ASSOCIATION, MARYLAND MUNICIPAL LEAGUE, MASSACHUSETTS MUNICIPAL ASSOCIATION, MICHIGAN MUNICIPAL LEAGUE, LEAGUE OF MINNESOTA CITIES, MISSISSIPPI MUNICIPAL LEAGUE, MISSOURI MUNICIPAL LEAGUE, MONTANA LEAGUE OF CITIES AND TOWNS, LEAGUE OF NEBRASKA MUNICIPALITIES, NEVADA LEAGUE OF CITIES, NEW HAMPSHIRE MUNICIPAL ASSOCIATION, NEW JERSEY STATE LEAGUE OF MUNICIPALITIES, NEW MEXICO MUNICIPAL LEAGUE, NEW YORK STATE CONFERENCE OF MAYORS AND MUNICIPAL OFFICIALS, NORTH CAROLINA LEAGUE OF MUNICIPALITIES, NORTH DAKOTA LEAGUE OF CITIES, OHIO MUNICIPAL LEAGUE, OKLAHOMA MUNICIPAL LEAGUE, LEAGUE OF OREGON CITIES, PENNSYLVANIA LEAGUE OF CITIES AND MUNICIPALITIES, RHODE ISLAND LEAGUE OF CITIES AND TOWNS, MUNICIPAL ASSOCIATION OF SOUTH CAROLINA, SOUTH DAKOTA MUNICIPAL LEAGUE, TENNESSEE MUNICIPAL LEAGUE, TEXAS MUNICIPAL LEAGUE, UTAH LEAGUE OF CITIES AND TOWNS, VERMONT LEAGUE OF CITIES AND TOWNS, VIRGINIA MUNICIPAL LEAGUE, ASSOCIATION OF WASHINGTON CITIES, WEST VIRGINIA MUNICIPAL LEAGUE, LEAGUE OF WISCONSIN MUNICIPALITIES, AND WYOMING ASSOCIATION OF MUNICIPALITIES

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SUMMARY

Just as NLC predicted, this proceeding has deteriorated into little more than a series of self-serving, one-sided anecdotes by industry whining about PROW requirements and state and local taxes. And also as NLC predicted, industry urges the Commission to become a national PROW regulatory authority and also to serve as industry's own private cheerleader in other fora. Industry's whining, however, overlooks three critical points. *First*, Congress made absolutely clear in the 1996 Act that the Commission is not the appropriate forum for resolving PROW or state or local tax disputes. Rather, Congress deliberately left these matters to democratically elected state and local legislatures and, where disputes arose, to the courts. *Second,* industry's whining about local PROW requirements and taxes is belied by the fact that the telecommunications industry is enjoying phenomenal success, growing far faster than other sectors of the economy that do not face the supposedly onerous PROW and tax burdens about which industry complains. Viewed from this perspective, industry's whining is nothing but a plea for industrial favoritism, which the Commission should reject. *Third*, the Commission lacks any expertise whatsoever on local PROW and tax matters, as well as the resources to serve as a national forum for resolving such disputes.

PROW Management and Compensation

Industry's attacks on local PROW requirements, and its companion requests for preemptive Commission PROW policies and rules, are both legally and factually flawed. A Congress that went out of its way to eliminate FCC jurisdiction over §253(c) PROW disputes would be surprised to learn that, according to industry, it instead transformed to

Commission into a national PROW regulatory agency, with state and local governments, rather than industry, as its primary relegatees.

Industry's assertion that PROW compensation is limited to cost is at odds with judicial precedent, the plain language of §253(c), and its legislative history. Industry's additional claim that §253(c) affirmatively limits localities to PROW compensation and management and mandates non-discriminatory treatment is likewise contrary to the plain language and legislative history in §253(c). In essence, industry seeks to resurrect the "parity" provision that Congress explicitly rejected. Industry also overlooks that Congress specifically considered the problem of century-old ILEC franchises and explicitly rejected the notion that localities should be locked into the terms and conditions of those century-old franchises.

Cable operators' claim that their telecommunications operations should be immune form §253(c) PROW requirements was similarly rejected by Congress. If accepted, this argument would give cable operators a free ride on the PROW and result in precisely the sort of discrimination among telecommunications providers about which other CLECs complain.

Industry's specific preemption proposals are likewise fatally flawed. Proposals for imposing a mandatory federal deadline on local PROW actions run afoul of both §253(d) and the Tenth Amendment. For the same reasons as well as Takings Clause problems, AT&T's "opt in" proposal and MCI's "fresh look" and "automatic preemption" proposals must be rejected. And proposals to transform the Commission into a national PROW

compensation rate-regulatory authority share all of these statutory and constitutional defects.

In the end, industry PROW proposals are both misdirected and myopic. They are misdirected in the sense that industry's real complaints are with §253 itself, and our constitutional system of federalism, matters that the Commission is powerless to address. And they are myopic because they focus on trees and (perhaps intentionally) ignore the forest: local PROW requirements cannot possibly be having any significant adverse effect on the growth of local facilities–based competition because, by any reasonable measure, such competition is growing by leaps and bounds, outperforming virtually all other sectors of the economy.

State and Local Taxes

Most industry commenters concede that the Commission has little or no authority over state and local taxes. The arguments of the few who believe otherwise are squarely foreclosed by statute and precedent.

Industry's self-serving complaints about its tax burden are unsound as a matter of policy, law and the facts. State and local tax treatment of telecommunications providers cannot meaningfully be assessed in a vacuum; if done at all, it must be done by looking at the entire fiscal needs and tax laws of a particular state or local taxing jurisdiction. That is something that neither Congress nor the Commission can do.

Moreover, industry's generalizations about state and local taxes are grossly misleading. Most of the state and local taxes about which industry complains do not single out telecommunications providers, but instead apply to all utilities. In any event,

the taxes are based on a variety of legitimate legislative tax policy judgments totally unrelated to the shift from monopoly to competition in the telecommunications industry. Telecommunications providers typically receive unique and economically valuable privileges from state and local governments – such as free or discounted access to PROW and eminent domain authority – that industry's hypothetical "general business" does not. If telecommunication providers were taxed in the same way as such a hypothetical "general business," they would receive a huge windfall benefit from government relative to that "general business." Further, imposing differential, and higher, taxes on utility-type services such as telecommunications serves the independent distributional tax policy goal of shifting relative tax burdens to large businesses and away from residential consumers. Also like utility and other essential services, demand for telecommunications services tends to be more stable (or at least more resistant to downside elasticity in recessions), thereby making taxes on such services a tax revenue source that is less volatile on the downside than taxes on other consumer goods and services.

These are, of course, tax policy judgments about which different state and local governments may hold differing views. But the point is that in our system of federalism, those are judgments that are best left to elected state and local legislatures. The federal government has no legitimate role in second-guessing, or uniformitizing, those judgments unless it can be shown that state and local tax policies have stunted the growth of telecommunications services. But the enormous recent growth and success of the telecommunications industry in the face of the allegedly heavy tax burden if faces – growth that has far outstripped that of other sectors of the economy which, according to industry, have a lighter tax burden – conclusively refutes any such claim.

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The National League of Cities ("NLC"), together with its member state municipal leagues representing municipalities in 49 of the 50 states, submit these reply comments in response to the opening comments filed in response to the Notice of Inquiry ("NOI"), released July 7, 1999, in the above-captioned proceeding.

National League of Cities
December 13, 1999

INTRODUCTION

Just as NLC predicted,[1] industry's opening comments confirm that this proceeding has devolved into little more than what even one industry member concedes are "self interested and anecdotal complaints of municipal abuse of PROW [public rights-of-ways] applicants" by "various CLECs and trade associations."[2] And also just as NLC predicted, industry commenters blatantly plead for the Commission to serve as a cheerleader for the already dollar-inflated voice of industry before the Congress, courts, state legislatures, and even the Advisory Commission on Electric Commerce ("ACEC").[3] Some industry commenters, however, even go beyond asking the Commission to serve as their cheerleader and taxpayer-funded lobbyist. Notwithstanding the plain language of 47 U.S.C. §253 and its legislative history, as well as the language and legislative history of §601(c)(2) of the 1996 Act and the language and legislative history of 47 U.S.C. §332 (c)(3), some industry members urge the Commission to adopt broad preemptive policy declarations and rules concerning local PROW management and compensation and to claim the power to preempt "excessive or discriminatory" state and local taxes.[4]

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[1] NLC Comments at 2-4, 13 & n.13.

[2] RCN Comments at 8

[3] *See, e.g.* Air Touch Comments at 9-11; AT&T Comments at 3-4, 18-19, & 44-56; ALTS Comments at 7-8; Cox Comments at iv; CTIA Comments at 2-3; GTE Comments at 3&12; NCTA Comments at 4-5 & 11-13; RCN Comments at 4-20; Sprint Comments at 7-8 & 12-14; USCA Comments at 2; Telegent Comments at 8.

[4] *See, e.g.* AirTouch Comments at 11-14; ALTS Comments at 7-10; BellSouth Comments at 8; AT&T Comments at 3-4 & 18-19; Cablevision Comments at 5&24; Cox Comments at iv; Global Crossing Comments at I & 9: GST Comments at 19; GTE Comments at 3: MCI Comments at 6; MediaOne Comments at 3; NCTA Comments at 4-13; RCN Comments at I & 10-12; Sprint Comments at iii & 7-12.

Lost amid the chorus of industry's self-serving whining, however, are two critical factors that counsel the Commission to put a prompt end to the industry feeding frenzy that the *NOI* has spawned.

First, while reasonable people may disagree about the wisdom of a particular local PROW requirement or state or local tax policy,[5] the issue is which public institutions should, and do, have the power to resolve those disagreements. And industry protestations to the contrary notwithstanding, Congress has made abundantly clear that the Commission is *not* the appropriate forum for resolving PROW disputes under §253(c), nor for reforming state and local telecommunications tax policies. Rather, Congress deliberately left these matters to democratically elected state and local legislatures, and where disputes arise, to the courts.

NLC submits that Congress' judgment is a wise one. As a distant, unelected federal agency, the Commission is not well positioned, either in terms of expertise in the areas of PROW management and compensation or tax law and policy, or in terms of fact-finding and evidence-gathering procedures and resources, to resolve disputes involving PROW requirements or state and local taxes. Rather, in our system of federalism, disagreements on these matters are best resolved by democratically elected state and local legislatures and, where conflicts arise, by the courts.

But regardless whether the Commission or industry agrees with Congress' judgment, neither is at liberty to second-guess that judgment here. Thus, many of the

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[5] Indeed, NLC member cities have different views about what kinds of PROW requirements and local taxes are appropriate. That diversity of viewpoint is reflected by the fact that local PROW and tax requirements vary considerably.

arguments made in industry comments – which in many cases are nothing more than efforts to resurrect the "parity" provision that Congress resoundingly rejected and to overturn the Gorton amendment in the Senate that Congress adopted – are simply misdirected. Industry's arguments in this regard belong before Congress, not the Commission, or, for that matter, the courts.

Second, even if the Commission had the authority to do what industry asks it to do (which it does not), there is no principled basis for Commission action. Although one would never know it from industry's incessant whining and complaining about supposedly burdensome and unfair state and local PROW and tax requirements, the undeniable truth is that all sectors of the telecommunications industry are enjoying unprecedented growth in terms of revenues, subscribers, amount of investment, ability to raise capital, and number of successful new entrants. Indeed, the telecommunications sector is among the fastest growing and most successful sectors, if the not the fastest growing and most successful sector, of the economy.

The telecommunications sector is growing far faster than virtually all other sectors of the economy. This is true even though members of virtually all of those other industries that are not performing as well as the telecommunications industry do not use the PROW and thus do not face the supposedly daunting "obstacle" of complying with local PROW requirements. Members of non-telecommunications industries are also, of course, not subject to the allegedly heavy tax burden that the telecommunications industry claims it bears.

The phenomenal recent growth of the telecommunications industry, and its recent enormous success vis-a-vis the economy in general, leave no doubt that from an overall perspective – the only perspective that the Commission can responsibly address here – local PROW requirements and telecommunications taxes are *not* having *any* significant adverse effect on the growth and success of the competitive telecommunications industry at all.

Why, then, does industry whine? Because it believes it sees an opportunity to convert the Commission into industry's own special attack dog against every form of state or local PROW requirement or tax that industry members would prefer to avoid. The Commission should make clear to industry that it has no intention of engaging in such blatant industrial favoritism.

I. INDUSTRY'S ATTACKS ON LOCAL PROW REQUIREMENTS ARE BASED ON A FUNDAMENTAL MISREADING OF THE LAW AND, IN ANY EVENT, PROVIDE NO BASIS FOR ANY COMMISSION ACTION

A. The Commission Lacks Authority to Issue Declarations or Adopt Rules Concerning Local PROW Requirements.

As expected, virtually all industry commenters urge the Commission to take formal action concerning local PROW requirements. Many urge the Commission to issue policy declarations concerning local PROW requirements, typically backed by the

threat of Commission preemption if a municipality does not conform to industry's proposed PROW policy declarations.[6]

Some industry commenters go even further, urging the Commission to institute a rulemaking and to adopt rules "implementing a unified framework" governing local PROW requirements.[7] At least one industry commenter goes so far as to suggest that the FCC should comprehensively regulate PROW compensation by imposing TELRIC or similar formal cost allocation rules on local governments.[8] Others suggest that the FCC should adopt rules placing time deadlines on local PROW actions,[9] allowing CLECs to "opt in" to the same PROW terms and conditions as ILECs,[10] requiring immediate (and apparently automatic) preemption of all local PROW requirements while CLECs negotiate with municipalities over PROW terms and conditions,[11] and allowing CLECs to renege on preexisting local PROW agreements under an "fresh look" policy.[12]

These far-reaching and aggressive proposals would, if adopted, transform the Commission into a national PROW regulatory commission, whose primary regulatees

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[6] *See, e.g.* AirTouch Comments at 4&8-11; ATLS Comments at 8-9; Cox Comments at iv; CTSI Comments at 4-8; GTE Comments at 3; Level 3 Comments at ii & 11-13; MCI Comments at 6; MediaOne Comments at 3& 8-10; NCTA Comments at 4-5 and 9-14; RCN Comments at i and 7-11; Sprint Comments at iii and 8-12; Teligent Comments at 8.

[7] *E.g.* Global Crossing Comments at i & 9; AT&T Comments at 3; Cablevision Comments at 5 & 24; GST Comments at 19; SBC Comments at i.

[8] RCN Comments at 9.

[9] *E.g.* AirTouch Comments: ALTS Comments; Cox Comments; RCN Comments.

[10] AT&T Comments at 3&30.

[11] *E.g.* MCI Comments at 6

[12] *Id.*

would be state and local governments rather than telecommunications service providers. But that goes far beyond the charter Congress gave the Commission.

Indeed, any effort by the Commission to regulate local PROW requirements would thwart the clearly expressed will of Congress under the plain language of §253(d) and its legislative history. As pointed out in our opening comments, the purpose of the Gorton amendment, which revised what is now §253(d) to eliminate FCC jurisdiction over PROW matters under §253(c), was crystal clear: to deprive the Commission of *any* jurisdiction over local PROW matters, leaving all such disputes to local governments' "home ground in their local district courts."[13]

A Congress that so clearly and unequivocally desired that the FCC stay out of PROW matters and that those matters be left to the courts would be surprised to learn that, according to industry commenters it instead supposedly gave the FCC authority not only to adopt comprehensive national rules governing local PROW requirements, but to back them up with authority to preempt local PROW requirements. In fact, of course, what industry wants is to have the Commission reverse the decision of Congress, something the Commission has no power to do.

Industry efforts to find a legal basis for short-circuiting the will of Congress are unavailing. The best that industry can do is cite to the Commission's general authority to promulgate rules consistent with the 1934 Act under 47 U.S.C. §§154(i) and 201(b) and

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[13] NLC Comments at 5-7 (quoting remarks of Sen. Gorton). AirTouch's curious quotation of Sen. Gorton's remarks (AirTouch Comments at 10-11 & 28) merely underscores the point: The Gorton amendment was intended to preserve FCC jurisdiction over §253(a) and (b) matters, and to *deny* the FCC jurisdiction over PROW matters under §253(c).

to the Supreme Court's statement in *AT&T v Iowa Utilities Board*, 119 S. Ct. 721, 730 (1999), that §201(b) gives the Commission jurisdiction to adopt rules governing the 1934 Act, including amendments made to it by the 1996 Act.[14]

But neither this unsurprising proposition nor the general authority given the Commission under §§154(i) and 201(b) will carry the weight industry seeks to place on them. We do not dispute that Sections §§154(i) and 201(b) give the Commission authority to adopt rules consistent with the 1996 Act. But they cannot plausibly be read to give the Commission jurisdiction to adopt rules that are *inconsistent* with the 1996 Act. And the simple truth is that since, as we have seen, §253(d) was specifically intended to *deprive* the Commission of jurisdiction over local PROW matters, any attempt by the Commission to intrude into local PROW matters by rule would be inconsistent with §253(d) which, of course, is itself a part of the 1996 Act. The Commission's general authority under Sections 154(i) and 201(b) simply cannot be read to trump Congress' explicit denial of authority over local PROW matters to the Commission in §253(d).

B. Even If The Commission Had Authority To Adopt Policies Or Rules Governing Local PROW Requirements, The Policies And Rules Requested By Industry Are Contrary To The 1996 Act.

Even if the Commission had authority to adopt policies or rules governing local PROW requirements (which it does not), the policies and rules that industry commenters propose are themselves inconsistent with the very provisions of the 1996 Act on which they are supposedly based and, in some cases, also run afoul of the Constitution.

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[14] *E.g.*, Cablevision Comments at 5 & 24; RCN Comments at 13-14.

Industry's proposals fall into two categories. First, we address industry's proposed policy statements, which are nothing more than arguments about what industry hopes the law will be. Then we address industry's specific procedural PROW preemption proposals.

1. Industry's Proposed PROW Policy Declarations Rest on Misstatements of Law and Mischaracterization of Precedent.

Industry commenters ask the Commission to make several declarations about what they hope or wish the law would be. As an initial matter, for reasons we have already stated,[15] the Commission is not an appellate court, much less the Supreme Court, and therefore should not be in the business of resolving conflicts among the courts in construing §253(c), nor of pressing its thumb on one side of the scales of pending litigation between industry and local governments. But even if the Commission were to intrude (unwisely, we believe) into this realm, the developing law regarding §253(c) is not as industry suggests.

a. Industry is wrong in suggesting that "fair and reasonable compensation" is limited to recovery of costs.

Industry commenters are virtually unanimous in asking the Commission to declare that "fair and reasonable compensation" for PROW use is limited to recovery of actual costs or, more typically, the more restrictive limit of incremental costs. Based on this

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[15] NLC Comments at 2-3 & 7-10.

claim, industry attacks gross revenue-based fees[16] and even per-line, per-foot, and per-mile fees.[17]

But applicable precedent simply does not say what industry wants it to say. As pointed out in our opening comments, industry's claim that "compensation" under §253(c) is limited to cost reimbursement is in fact the distinct *minority* view of the courts, a minority composed of a single decision.[18] And the weight of judicial authority *against* industry's "cost" argument has in fact grown since opening comments were filed in this proceeding.

On November 8, 1999, the South Carolina Supreme Court rendered its opinion in *BellSouth Telecommunications v. City of Orangeburg,* Opinion No. 25009 (S.C. Sup. Ct. filed Nov. 8, 1999).[19] Rejecting BellSouth's claim that Orangeburg's 5% gross revenue-based fee was not "fair and reasonable compensation" under §253(c), the court sided with the majority view of *Dearborn*,[20] rejecting what has become the minority view of *Prince George's County*:[21]

> We find that a franchise fee equal to a percentage of revenue generated is not inherently unfair or unreasonable as a measure of the franchise's value as a business asset to the franchisee. Absent any evidence that the *amount* of the

[16] *E.g.* ATLS Comments at 17; AT&T at 20-24.

[17] *E.g.,* Level 3 Comments at 13; Cablevision Comments at 3: McLeod Comments at 2-3; ICG Comments at 4-6.

[18] NLC Comments at 8-10.

[19] The *Orangeburg* decision can be found at <http://www.law.sc.edu/opinions/25009.>

[20] *TCG Detroit v. City of Dearborn,* 16 F. Supp 2d 785 (E.D. Mich. 1998) *appeal pending* Nos. 98-2034 & 98-2035 (6th Cir).

[21] *Bell Atlantic v. Prince George's County,* 49 F. Supp 2d 804 (D.Md. 1999), *appeal pending* No. 99-1784 (4th Cir. filed June 14, 1999).

> percentage is unfair, we decline to find the fees in this case violate the Telecommunications Act.[22]

The *Orangeburg* decision is quite telling. ALTS (at 18) characterizes Orangeburg's 5% fee as "perhaps the best example" of an excessive fee. Apparently, the court did not share ALTS's view.

Moreover, industry fails to come to grips with the legislative history of §253(c), which makes crystal clear that Congress did not intend to prohibit gross revenue-based fees, or limit compensation to cost recovery.[23] Rep. Barton, one of the successful sponsors of the Barton-Stupak amendment that became §253(c), stated:

> The Federal Government has absolutely no business telling State and local governments how to price access to their local rights-of-way. We should vote for localism and vote against any kind of Federal [PROW] price controls.[24]

And that is precisely what Congress did, passing the Barton-Stupak amendment by an overwhelming 338 to 86 vote.[25]

Industry contortions to evade and twist the legislative history are unavailing. First, they attempt to sidestep the Barton-Stupak amendment debate by pointing to the supposed list of permissible local PROW functions in a letter contained in the Senate debates surrounding the Feinstein-Kempthorne and Gorton amendments.[26] But aside

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[22] *Orangeburg*, slip. op at 7.

[23] NLC Courts at Attach. A, pp 10-12.

[24] 141 Cong. Record H8460 (daily ed. Aug. 4, 1995) (remarks of Rep. Barton).

[25] *Id.* at 8477.

[26] *E.g.*, AT&T Comments at 21n. 48.

from the fact that, at most, this letter discusses PROW management, not the separate interest of PROW compensation preserved by §253(c), the Senate debate – and the Gorton amendment that ultimately passed – was *not* about what is now §253(c), but about §253(d) concerning the scope of FCC jurisdiction.[27] The *only* debate about the meaning of "fair and reasonable compensation" in Section 253(c) is found in the debate surrounding the Barton-Stupak amendment in the House.

Second, some industry commenters incredibly assert that the "fair and reasonable compensation" requirement of §253(c) was intended to eliminate local governments' "proprietary" interest in rights-of-way[28] and that, while the House "parity" provision permitted gross revenue-based fees, the Barton-Stupak amendment did not.[29] These claims are positively Orwellian. The Barton–Stupak debate unequivocally reveals that what is now §253(c) is based on the premise that "in our free market society, companies should have to pay a fair and reasonable rate to use public property."[30] And if there is one thing that both the proponents *and* opponents of the Barton-Stupak amendment agreed upon, it was that the amendment permitted gross revenue-based fees.[31]

AT&T tries to sidestep this problem by pointing to *Evansville-Vanderburgh Airport Authority District v. Delta Airlines,* 405 U.S. 707 (1972), and suggesting that

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[27] NLC Comments at 5-6; 141 Cong. Record S8170 (daily ed. June 12, 1995) S.8213 (daily ed. June 13, 1995) & S. 8306-08 (daily ed. June 14, 1995).

[28] NCTA Comments at 10.

[29] Level 3 Comments at 11-12.

[30] 141 Cong. Rec. H8460 (daily ed. August 4, 1995) (remarks of Rep. Stupak). *Accord* NLC Comments at Attach. A, pp. 10-12.

[31] *Id.*

"[u]nder established federal standards for 'reasonableness,' usage fees must be cost-based." AT&T Comments at 20.

As an initial matter, AT&T ignores that the *Evansville* test has only been applied to airlines and interstate truckers and buses, whose primary assets are inherently mobile (airplanes, trucks, and buses) and make only transient use of public property.[32] To NLC's knowledge, the *Evansville* test has never been applied to compensation for installation on public property of permanent, non-mobile commercial plant like telecommunications providers' wires, cables, pedestals, transmitters and other equipment. In this respect, gross revenue-based PROW fees charged telecommunications providers are much more akin to the gross revenue-based rent that airport concessionaires paid in *Northwest Airlines*, a rent the Court recognized was a "market rate for their space." 510 U.S. at 360 n.5. Perhaps more to the point, in the directly analogous context of cable television systems, both Congress *and* the courts have explicitly endorsed gross revenue-based PROW compensation, 47 U.S.C. §542(b); *City of Dallas v. FCC,* 118 F. 3d. 393, 397 (5th Cir. 1997).[33]

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[32] At issue in *Evansville* and *Northwest Airlines v County of Kent*, 510 U.S. 355 (1994), were airport fees imposed on commercial airlines. Air travel is predominately, if not overwhelmingly, interstate in nature. *See Evansville,* 405 U.S. at 717 ("the vast majority of passengers who board flights at the airports involved are traveling interstate"); *Northwest Airlines*, 510 U.S. at 372-73 (assuming that commercial airline traffic is interstate and *unwilling* to assume general aviation traffic is primarily interstate). The *Evansville* test has also been applied to per-vehicle taxes imposed on interstate truckers. *E.g. American Trucking Assn. v. Scheiner,* 483 U.S. 266 (1987).

[33] It is also worth noting that Congress knows how to prohibit revenue-based fees if it wishes. Indeed, Congress explicitly did so in the context of airport fees. 49 U.S.C §1513(a). *See Aloha Airlines v. Director of Taxation of Hawaii*, 464 U.S. 7, 14 (1983). That Congress chose *not* to prohibit such fees in §253(c) further underscores the weakness of industry's position.

But even assuming *arguendo* that the *Evansville* test is applicable, it is of no help to industry here because that test is far more deferential to local governments than AT&T suggests. *Evansville* held that fees charged for use of public property are presumed reasonable, and the burden is on those attacking the fees to show that they are excessive:

> "[W]here a state at is own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. *The amount of the charges and the method of collection are primarily for determination by the state itself; and so long as they are reasonable and are fixed according to some uniform, fair, and practical method , they constitute no burden or interstate commerce . . . The action of the state must be treated as correct unless the contrary is made to appear.*"[34]

Moreover, *Evansville* also makes clear that the reasonableness of the fees charged for use of public property is judged "by its result, *not* its formula" and that only a "rough approximation rather than precision" is required.[35] Fees will be upheld as long as they "reflect a fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed." *Evansville,* 405 U.S. at 717. Applying this lenient standard, *Evansville* noted that the Supreme Court has "sustained numerous tolls based on a variety of measures of actual use, including: horsepower ..., number and capacity of vehicles ..., mileage within the State ..., gross ton mileage ..., carrying capacity ..., and manufacturer's rated capacity and weight of trailers." *Id.* at 715 (citations omitted)

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[34] *Evansville*, 405 U.S. at 712-713 (quoting *Hendrick v. Maryland*, 235 U.S. 610, 624 (1915)) (emphasis added) (citations omitted).

[35] *Evansville* 405 U.S. at 716 (quoting *Capitol Greyhound Lines v. Brice,* 339 U.S. 542, 545 & 546-47 (1950)) (emphasis added).

It bears emphasizing that, like the gross revenue-based, per-line and per-foot fees attacked by industry here, *all* of these formulas sanctioned by *Evansville* are based on the volume of the *fee-payer's* business, and *none* is based on a formula tied to the government's costs of acquiring and managing the public property at issue.

Finally, in addition to being contrary to the language and legislative history of §253(c), industry's "cost" argument would, by industry's own inadvertent admission, raise serious constitutional problems. SBC (at 4 n. 6) admits, for example, that "[h]istorically, Texas municipalities based calculation of rights-of-way fees on a percentage of gross receipts (typically 4%)." But if SBC and other industry commenters were correct that Congress intended §253(c) to abolish localities' historical rights to PROW compensation based on gross revenues, per-line, per foot or any method yielding by fees in excess of incremental costs, then of course §523(c) would raise serious Takings Clause issues under the Fifth Amendment. Precedent is clear, however, that courts will not construe a statute in a way that would raise constitutional questions unless there is no other plausible reading of the statute.[36] And as we have seen, industry's "cost" argument is not only far from the only plausible reading of §253(c); it is in fact the *least* plausible reading of it.

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[36] *E.g., Dept. of Commerce v. House of Representatives,* 119 S. Ct. 765, 779 (1999); *Bell Atlantic v FCC;* 24 F. 3d 1441 (D.C. Cir. 1994).

b. Industry misconstrues §253(c) as a limitation on state and local authority, when in fact it is a limitation on federal preemption authority.

Industry commenters repeatedly urge the Commission to declare that §253(c) limits local authorities to the "narrow" areas of PROW compensation and management and affirmatively prohibits localities from imposing any PROW requirements in a discriminatory or non-competitively neutral fashion.[37]

The problems with this argument are two-fold. First, it cannot be squared with the plain language of §253(c). Second, if accepted, it would resurrect the very "parity" provision that even industry concedes Congress rejected in the Barton-Stupak amendment.

How a provision introduced with the phrase "Nothing in this section" can plausibly be construed to be an affirmative limitation on state and local authority, as opposed to a limitation on *federal* preemption authority, industry cannot explain. In fact, industry's strained reading is at odds not only with the plain language of §253(c), but other provisions of the 1996 Act as well. The fallacies of industry's position are pointed out in NLC's *amicus* brief in the *Prince George's County* appeal, attached to our opening comments.[38] Since industry has yet to face up to those arguments, we simply refer the Commission to our earlier filing.

Industry's claim that §253(c) mandates non-discriminatory PROW management and compensation requirements suffers not only from this plain language defect, but

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[37] *E.g.* ALTS Comments; AT&T Comments: Cablevision Comments; Cox Comments; NCTA Comments; MediaOne Comments.

another one as well: In essence, industry is seeking to resurrect the "parity" provision that the House overwhelmingly rejected in adopting the Barton-Stupak amendment. Unlike what is now §253(c), this "parity" provision was not introduced by the safe harbor language "Nothing in this section," but instead affirmatively prohibited local governments from imposing any PROW fee or assessment that discriminated among providers, including the ILEC.[39] Thus, in suggesting that the Barton-Stupak amendment, which deleted the "parity" provision and inserted what is not §253(c), nevertheless affirmatively obligates localities to impose non-discriminatory PROW compensation and management requirements, industry is improperly asking the Commission to overrule the judgment of Congress.

For the same reason, CLEC commenters' plea that §253(c) entitles them to the same terms and conditions as century-old state or local franchises held by ILECs,[40] as well as AT&T's proposal that CLECs be allowed to "opt in" to the same PROW terms and conditions as ILECs,[41] miss the mark. Contrary to RCN's suggestion (at 12), Congress' explicit rejection of the "parity" provision can only mean that Congress did *not* intend §253 "to provide that PROW administrators must treat ILEC and CLEC competitors with strict equality in respect to access to, and use of PROW."

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[38] NLC Comments, Attachment A at pp. 16-19

[39] The "parity" provision, which was §243(e) of the House bill before floor amendments, is reproduced at 141 Cong. Rec. H8427 (daily ed. Aug. 4, 1995).

[40] *E.g.* ALTS Comments at 8 & 10-16; AT&T Comments at 27; Cablevision at 21; MCI Comments at 2; MediaOne Comments at 9; NCTA Comments at 5 &13-14; RCN comments at 12.

[41] AT&T Comments at 3.

The legislative history of the Barton-Stupak amendment leaves no doubt that Congress was quite aware of the problem concerning century-old ILEC franchises, and it also leaves no doubt that, by deleting the "parity" provision, Congress did *not* want those old ILEC franchises to lock municipalities into zero PROW compensation arrangements with CLECs. As Representative Stupak stated:

> The manager's amendment [the "parity" provision] states that local governments would have to charge the same fee to every company, regardless of how much or how little they use the right-of-way or rip up our streets. *Because the contracts have been in place for many years, some as long as 100 years, if our amendment is not adopted, it the Stupak-Barton amendment is not adopted, you will have companies in many areas securing free access to public property. Tax-payers paid for this property, tax payers paid to maintain this property, and it simply is not fair to ask the tax-payers to continue to subsidize telecommunication companies.*[42]

In response to Rep. Stupak, opponents of the Barton-Stupak amendment made precisely the argument in defense of the "parity" provision that RCN and other industry commenters now make: The "parity" provision was intended "to prevent local government from continuing their longstanding practice of discriminating against new competitors in favor of telephone monopolies."[43] Another Barton-Stupak opponent likewise stated that the purpose of the "parity" provision was " to overcome historically

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[42] 141 Cong. Rec. H8460 (daily ed. August 4, 1995) (remarks of Rep. Stupak) (emphasis added).

[43] *Id.* at 8461 (remarks of Rep. Schaefer).